IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANNETTE MARIE POTTER, Appellant.	No. 37782-9-II UNPUBLISHED OPINION

Houghton, P.J. — Annette Potter appeals her conviction of unlawful possession of methamphetamine, arguing that she received ineffective assistance of counsel. We affirm.

FACTS

On January 3, 2008, Bremerton police officers executed a search warrant at 1301 Trenton Avenue in Bremerton. On that date, Annette[1] lived there with her husband, Robert. During the search, the officers found a locked metal-type box in the Potters' second floor bedroom under Annette's side of the bed; the box contained methamphetamine and other drug paraphernalia. She denied the box belonged to her and said she thought the officers planted it. The officers also found other drug paraphernalia suggestive of methamphetamine use in various common areas of the house and in the Potters' bedroom.

On January 4, the State charged Annette with possession of a controlled substance under RCW 69.50.4013 and RCW 69.50.206(d)(2). At trial, Annette testified that just prior to the

[1] For clarity, we refer to the Potters by their given names.

search, she let four visiting friends of their children and Robert's nephew into her bedroom to see Robert, shut the door to the bedroom, and went to do laundry elsewhere on the second floor. She also testified that when the officers arrived, she came downstairs but others remained upstairs for "quite a while." Report of Proceedings (RP) at 109. She denied having ever seen the box before the officers found it but did not repeat her claim that the officers planted it.

During trial, witnesses for the State referred to evidence of distribution or intent to distribute. For example, when asked by the State whether one gram of methamphetamine is a user amount or a large amount, Sergeant Randy Plumb testified that quantities of methamphetamine more than one gram suggest that the possessor is "probably doing something else with it" other than using. RP at 24. Shortly after, when asked by the State whether he recognized bags of methamphetamine being offered into evidence, Plumb testified that he recognized them because he remembered that there was "kind of a substantial quantity [of methamphetamine] in the bags [found at the scene], plus [the bags were] sealed in our property evidence packaging." RP at 36. He also mentioned that the officers needed to have the search warrant expanded after opening the locked box. RP at 30-31.

Later, Detective Floyd May testified regarding the expanded search warrant, saying, "I believe it was Sergeant Plumb that called me upstairs and he showed me a lockbox, and based on the contents of the lockbox, we chose to stop searching because there was evidence of a more serious crime, possession with intent, so we stopped searching, and I had to contact another judge to expand the warrant." RP at 59. Detective Harold Whatley also testified regarding the expanded search warrant, saying, "We found evidence of distribution, so we stopped our search,

we reapplied, we expanded our warrant in order to allow us to search for distribution of narcotics, because that's some of the evidence that we found." RP at 97.

Defense counsel did not object to any of these comments. Counsel also did not object to the admission of the locked box or its contents. Counsel did object to the admission of testimony regarding paraphernalia found throughout the residence, at which time the following exchange occurred:

> THE COURT: . . . [C]ertainly I can see a 403 analysis would have to be made by the court because this is a simple possession of methamphetamine case, and it's not expanded beyond that, although this Officer May has already testified that he got an expanded warrant for possession with intent he called it, which I don't think the jury picked up on what that might be. This isn't a delivery case or intent to deliver case.
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> [DEFENSE COUNSEL]: I heard him say that. Defense isn't terribly concerned that that's --
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> THE COURT: You didn't object. That's fine, but I am just saying this is not a possession with intent or intent to deliver, which is what I assume the second search warrant was all about, but that's not how this case is charged, and so a lot of what's in the second search warrant is not going to be relevant because it's not probative of the charge here.

RP at 69-70. Over the objection, the trial court permitted the admission of the paraphernalia associated with methamphetamine use. The State's witnesses testified regarding this paraphernalia. The jury found Annette guilty as charged. She appeals.

ANALYSIS

Annette contends that defense counsel possessed no legitimate trial tactic for not objecting to the admission of evidence of distribution. As a result, she argues that she received ineffective assistance of counsel.

The United States and the Washington State Constitutions guarantee criminal defendants

the right to effective assistance of counsel. U.S. Const. amend. VI; Const. art. I, § 22 (amend. 10). We review ineffective assistance claims de novo. *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

To prevail on an ineffective assistance of counsel claim, a defendant must show that defense counsel's deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). A defendant must prove both prongs to prevail. *Thomas*, 109 Wn.2d at 226.

When deciding whether counsel's performance was deficient, we analyze whether counsel's representation fell below an objective standard of reasonableness based on the totality of the circumstances. *Thomas*, 109 Wn.2d at 226. Scrutiny of counsel's performance is highly deferential, and we exercise a strong presumption of reasonableness. *Thomas*, 109 Wn.2d at 226. Trial strategy and tactics do not constitute deficient performance of counsel. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Whether and when to object is a classic example of a trial tactic, and failure to object constitutes ineffective assistance of counsel only in egregious circumstances where the evidence is central to the State's case. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989).

Here, defense counsel's decision not to object constitutes a trial tactic. The testimony at issue represented a small fraction of the total witness testimony: less than one page out of nearly 100 pages total. The comments regarding distribution or intent to distribute were brief, and the State made no effort to emphasize or elaborate on those comments. The officers did not aim their

comments at Annette; they made the comments almost exclusively within the context of the expanded warrant and did not use them to express their opinion of her guilt or innocence.

Furthermore, defense counsel conducted no cross-examination of the officers regarding the evidence of distribution, elicited no testimony from Annette regarding it, and made no reference to it during closing argument. Defense counsel even commented to the trial court that he heard the testimony and was not "terribly concerned" about it. RP at 69. The trial court also mentioned that it did not think the jury "picked up on" the meaning of possession with intent. RP at 69.

Given these circumstances, defense counsel could have decided that even a successful objection could draw undue attention to this unfavorable but fleeting testimony and instead chose to avoid addressing it in the hopes that the jury would not consider it. Also, given that the State did not charge Annette with delivery or intent to deliver, defense counsel may not have objected so that the jurors saw that the police originally thought Annette had committed a different crime but that the evidence did not support such a charge, implying that the evidence did not support mere possession either. Thus, counsel's failure to object does not constitute deficient performance of counsel as it is a question of trial tactics. Because counsel did not provide deficient representation, we do not address the prejudice prong.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Houghton, P.J.

We concur:

Hunt, J.

Quinn-Brintnall, J.